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Supreme Court, U.S.
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No. 07-

In the

Supreme Court of the United States

Kenneth Allen Goldblatt,

Petitioner,

-v-

Carey D. Ebert, Trustee,

Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Was the "late filing" of the petitioner's Brief which caused the court of appeals to dismiss the petitioner's appeal caused by court personnel rather than by the petitioner and is it a denial of due process to punish a blameless litigant for the mistakes or oversights of court personnel?

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Citations of Opinions and Orders

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit in *In the Matter of Kenneth Allen Goldblatt; Kenneth Allen Goldblatt v. Carey D. Ebert, Trustee*, Docket No. 07-10232, decided October 31, 2007, reaffirming the District Court's dismissal of the petitioner's untimely bankruptcy appeal, is set forth in the Appendix hereto (App. D - p. 33).

The published opinion of the United States Court of Appeals for the Fifth Circuit in *In the Matter of Kenneth Allen Goldblatt; Kenneth Allen Goldblatt v. Carey D. Ebert, Trustee*, Docket No. 05-10747, decided August 18, 2006, and reported at 203 Fed. Appx. 545, 548, affirming the District Court's dismissal of the petitioner's untimely bankruptcy appeal, is set forth in the Appendix hereto (App. C – p. 26).

The unpublished Order of Dismissal by the District Court for the Northern District of Texas at Fort Worth, in *Kenneth Allen Goldblatt v. Carey D. Ebert, Trustee*, Docket No. 4:04-CV-337-Y, filed February 5, 2005, dismissing the petitioner's appeal from the Bankruptcy Court to the District Court, is set forth in the Appendix hereto (App. A – p. 22).

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit in *In the Matter of Kenneth Allen Goldblatt; Kenneth Allen Goldblatt v. Carey D. Ebert, Trustee*, Docket No. 07-10232, decided November 28, 2007, denying the petitioner's combined petition for rehearing or for rehearing en banc, is set forth in the Appendix hereto (App. E – p. 36).

Basis for Jurisdiction in this Court

The decision of the United States Court of Appeals for the Fifth Circuit reaffirming the District Court's dismissal of the petitioner's appeal from the Bankruptcy Court, was entered on October 31, 2007; and its further order denying the petitioner's timely filed combined petition for panel rehearing or for rehearing en banc was filed and decided on November 28, 2007 (App. E – p. 36).

This petition for writ of certiorari is filed within ninety (90) days of November 28, 2007. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

Constitutional, Statutory ar. l Rule Provisions Implicated by this Petition

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

United States Constitution, Amendment XIV, Section 1:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

28 U.S.C. Section 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Federal Bankruptcy Rule 8001(a):

An appeal from a judgment, order, or decree of a bankruptcy judge to a district court . . . shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. An appellant's failure to take any step other than [the] timely filing [of] a notice of appeal does not affect the validity of the appeal but is ground only for such action as the district court or the bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal.

Federal Bankruptcy Rule 8002(a):

. . . .[T]he notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from.

Statement of the Case

The core substantive issue of this litigation in the original trial court – and in each and every forum in which the issues have since been addressed – is the value of a parcel of commercial real estate located in Grapevine, Texas, which provides the location for a lucrative burial vault manufacturing business.

In 1994, as a favor to friends, the petitioner Kenneth Allen Goldblatt ("the petitioner" or "Goldblatt") purchased a mortgage note in order to stop the foreclosure of this property in Grapevine, Texas, and to allow the co-executors of an estate owning the property additional time to sell the property for the estate's benefit. The business tenant of the property who had manipulated the property into foreclosure in the first place then sued the petitioner and others in a Texas probate court claiming that Goldblatt had conspired to interfere with its right to purchase the property. The tenant's suit prevented the co-executors from collecting the rents due on the premises and the petitioner was forced to foreclose on the equity of redemption underlying the mortgage note he held.

The Texas probate court eventually entered a summary judgment declaring that the petitioner's foreclosure had cut off the tenant's rights to purchase the property. However, the court on May 11, 2000, then issued an erroneous judgment markedly different from its earlier rendition finding that the petitioner had engaged in a civil conspiracy to interfere with the tenant's business operations, entering a permanent injunction which prevented the petitioner from interfering with those operations on property which the court had previously found – and reaffirmed in its final rendition – that the

petitioner still lawfully owns. It awarded the tenant money damages and erroneously declared the value of the subject real estate to be just $105,000.00 even in the face of appraisals of much higher value.

Once the state probate court litigation was completed, the tenant refused to pay a market-rate rent demanded by petitioner for use of his real estate; he accordingly began proceedings to evict the recalcitrant tenant. Simultaneously, the petitioner filed a Chapter 11 bankruptcy petition in federal bankruptcy court in order to protect the property from judicial foreclosure for the judgment debt while he appealed the flawed state court judgment. In its response to petitioner's appeal of the trial court's errors in the judgment itself, an intermediate appeals court in the State of Texas issued an unpublished opinion which ignored the inconsistencies and conflicts contained in the judgment and affirmed the judgment. The Texas Supreme Court refused the petitioner's plea to clarify the inconsistencies in this ruling.

Subsequently, the tenant filed an action in bankruptcy court to take the property from the petitioner by arguing that the property value set by the state trial court of $105,000.00 was not sufficient to allow the petitioner to successfully complete a voluntary plan of reorganization under Chapter 11, thereby forcing the petitioner into an involuntary dissolution under Chapter 7 of the Bankruptcy Code.

Because the bankruptcy court adopted the diminished value for the property of $105,000 as set by the state court, the petitioner's bankruptcy proceeding was transferred to Chapter 7 status. By this time, the tenant had been in possession of the property for over two years without paying any rent. When the Bankruptcy Trustee refused to

seek back rent from the tenant, the petitioner sought to have the Trustee abandon the claims to him by filing a Contested Matter. The Trustee refused and the bankruptcy court upheld the Trustee. Worse, the Trustee abandoned the subject real estate, allowing a judicial foreclosure by the tenant as a judgment holder.

On April 16, 2003, the bankruptcy court denied the petitioner's Motion to Compel the Trustee to Abandon Claim. A Motion for Rehearing and a New Trial was timely filed by the petitioner and then denied on August 5, 2003. The petitioner timely filed a Notice of Appeal on August 12, 2003. On August 20, 2003, the petitioner timely and properly filed his Designation of Record on Appeal. On August 24, 2003, he received a Clerk's Notice of Fees Due and paid the said fee on August 25, 2003. On March 31, 2004 Petitioner filed his 418-page Record on Appeal consisting of ten (10) numbered documents. On June 9, 2004, the District Court issued an Order to Show Cause why the petitioner had not filed his Appellant's Brief and ordering him to do so by June 23, 2004, if he desired to pursue his appeal.

During the pendency of the petitioner's suit against the Trustee to abandon the claims and his subsequent appeal to the District Court from the bankruptcy court's rulings affirming the Trustee's actions, the subject real estate sold at a constable's sale on May 12, 2004, for $320,800.00, a value more than three times the amount the tenant had been claiming for years that the property was worth, a value that invalidates all of the tenant's previous claims about the worth of the property and a value which substantiates the petitioner's repeated assertions that the property was capable

of funding his voluntary reorganization plan under Chapter 11 of the Bankruptcy Code.

On June 23, 2004, the petitioner filed his response to the District Court's Order to Show Cause of June 9, 2004, and attached to his response a copy of his Brief as Appellant. Petitioner also attempted to file his appellate brief as required by the Order to Show Cause, as well as a Motion to Supplement the Record of the Appeal to add the Constable's Deed to the record.

At the time the petitioner filed his response together with his appellate brief, the filing clerk told him that it was the District Court's policy not to file his brief until the court ruled on his Motion to Supplement the Record. The petitioner informed the filing clerk that his brief as appellant was being filed in response to an Order to Show Cause. The Clerk file-stamped the Brief on the back page as "Received" as of June 23, 2004 at 1:10 P.M. and informed the petitioner that the action (and stamp) would show that he had complied with the Court's Order to Show Cause and that the Brief would be filed by the Clerk once the District Court had acted on his Motion to Supplement the Record.

Petitioner specifically asked the Clerk if any other action on his or his attorney's part would be required to perfect the filing of his appellate Brief and the Clerk told him that the Clerk's Office would "take care of it" without any further action by him or his attorney once the Court had ruled on his Motion to Supplement the Record of the Appeal.

On June 28, 2004 the District Court issued an Order striking/un-filing the Motion to Supplement the Record because it did not contain a Certificate of Conference. On July 21, 2004, the petitioner's counsel re-filed the Motion with the

required Certificate of Conference. Petitioner's counsel also inquired about the refusal of the Clerk to file the petitioner's appellate Brief which had been appended to his response to the District Court's Order to Show Cause of June 9, 2004, stating that he had copies of the Brief "stamped as received by the Clerk's office on June 23, 2004, at 1:10 p.m." The Clerk's Office did not respond to this inquiry.

On September 16, 2004, the District Court issued its Order Granting the petitioner's Motion to Supplement Record. However, on February 25, 2005, the District Court issued another order dismissing in its entirety the petitioner's appeal to the District Court from the bankruptcy court's rulings affirming the Trustee's actions because his appellate Brief has not yet been filed and was "over nine months late" (App. A – p. 23).

On March 7, 2005, the petitioner timely filed a Motion for New Trial which recounted all of his actions in perfecting the Appeal and in filing his appellate Brief on June 23, 2004. In addition, the petitioner again filed his appellate Brief as the Appellant separately on March 7, 2005, and referenced this filing of the Brief in his Motion for New Trial.

On May 4, 2005, the District Court denied the petitioner's Motion for New Trial erroneously holding in part "the appellate brief never was filed separately as its own document. . ." and that the petitioner's recollection of events incident to the filing of his appellate Brief must be inaccurate since a Clerk would never refuse to file such a document. (App. B – p. 26 and C – p. 32) The Order also observed that "[t]he response to the show-cause order was not thereafter re-filed, and the appellant brief was never filed separately with the clerk" (App. B – p. 26 and C – p. 32).

In fact, the record clearly indicates otherwise, i.e., that the filing of the petitioner's Brief separately was confused by the actions of an employee of the Clerk's office and the failure of the Clerk's staff to file the Brief properly when it was proffered by the petitioner on June 23, 2004, and/or after the Motion to Supplement the Record was heard as the petitioner was informed that it would be. In either case, the petitioner is blameless but is suffering for the errors of employees/agents of the Clerk's Office over whom he has no control.

The Order also stated that the petitioner "has wholly failed to submit any evidence supporting his version of events, nor has he specifically identified the deputy Clerk who [sic] he alleges refused to file his brief or submitted a copy of the brief that he alleges was received-stamped on the back" (App. B – p. 26). In fact, however, the petitioner's Motion for New Trial included a complete copy of the Brief showing a Certificate of Service dated June 23, 2004, including a file stamp of the Clerk's Office as well as an "ORIGINAL" stamp with a filing Clerk's initials above this latter stamp. All of this was enough evidence to identify the file Clerk in question and allow the Court to identify in its files the originally-filed copy of the Brief with the "received" stamp on the back of the final page.

On June 1, 2005, the petitioner filed his notice of appeal. On August 18, 2006, the court of appeals for the Fifth Circuit affirmed the District Judge's dismissal of the petitioner's appeal and the denial his motion for a new trial (App. C – p. 33). In reaching this result, the court noted that while the petitioner's Brief was not separately filed strictly in accord with Bankruptcy Rule 8009(a), it "was filed [on June 23, 2004] as an

attachment within the extension delay" (App. C – p. 31). Moreover, it thought that "[a]rguably, Goldblatt initially did not willfully fail to file his brief" and noted that the Trustee had received the petitioner's Brief and was not prejudiced. (App. C – p 32).

However, the court concluded that the petitioner did not separately file his Brief in the wake of an order by the District Court on June 28, 2004, to "unfile" his response to the Order to Show Cause to which his Brief was appended (App. C – pp. 30-31). In addition, it found that the petitioner's failure to separately re-file his Brief until March of 2005 "demonstrates a certain stubbornness or willfulness sufficient to warrant dismissal" (App. C – p. 32).

On September 18, 2006, the petitioner filed a motion for rehearing in the bankruptcy court which was denied on October 2, 2006. He filed another notice of appeal with the bankruptcy court on October 20, 2006. In pursuit of the re-filing of the appeal to the district court, the petitioner's attorney contacted the District Clerk for the Fort Worth District who admitted that the original intake clerk made "a mistake" in un-filing the petitioner's separately filed brief and told the attorney that since the incident occurred, the procedure within the District Clerk's office had been changed.

On January 16, 2007, the District Court held a telephone hearing with the parties and the petitioner's appeal was dismissed (App. D – p. 35). The minutes of that hearing indicate that the petitioner's appeal was dismissed for "untimeliness of, *inter alia*, bankruptcy appeal, designation of record on appeal, and filing of appellate brief" (App. D – p. 36).

The petitioner appealed to the court of appeals for the Fifth Circuit for the second time on this single issue on February 15, 2007. In preparing his appellate Brief, the petitioner discovered that the designated documents of the Record on Appeal were never delivered to the District Clerk's Office and were still not a part of the file. Thus the reasons cited for the dismissal were erroneous and constitute an abuse of discretion on the part of the district court and gross negligence on the part of the Clerk Office.

Nevertheless, the court of appeals affirmed the dismissal of the petitioner's appeal because the notice of appeal he filed on October 16, 2006, was beyond the ten-day period allowed by Bankruptcy Rule 8002(a), and therefore untimely (App. D – p. 37). The court of appeals denied the Goldblatt's combined petition for rehearing or rehearing en banc on November 28, 2007 (App. E – p. 39) that demonstrated that the panel's understanding of the date of the dismissal order was in error (App. F – p. 41-48 *passim*).

Argument in Support of Allowance of the Writ

Imposing the Most Severe Sanction of Dismissal upon an Innocent and Faultless Litigant for the Oversight or Negligence of the Clerk's Office is a Violation of Due Process and Warrants the Granting of this Petition.

The District Court erroneously dismissed the petitioner's appeal for failure to file an appellate Brief when, in fact, the petitioner had filed copies of the Brief three separate times but had the separately filed Brief "un-filed" due to an

error by the Clerk's Office. The petitioner appealed the dismissal to the court of appeals which upheld the dismissal. The petitioner immediately re-filed his appeal which was then dismissed again for reasons not stated in the final judgment of the District Court but which served to deny the petitioner his day in court on the critical and important issues of this case, i.e., the value of a parcel of commercial real estate he owns in Grapevine, Texas.

The record indicates that the separate filing of the petitioner's Brief was confused by the actions of an employee of the Clerk's Office and the failure of the Clerk's staff to file the Brief properly when it was proffered by the petitioner for filing on June 23, 2004, and/or after the Motion to Supplement the Record was heard as the petitioner was informed that it would be. In either case, the petitioner is blameless but is suffering through the dismissal of his appeal for the errors of employees/agents of the Clerk's Office over whom he has no control and for whom he is not responsible.

This Court has repeatedly acknowledged that the federal courts have a "virtually unflagging obligation . . . to exercise [the] jurisdiction given them" by Article III and by federal legislation. *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 716 (1996). *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 821 (1976). *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964). *Wilcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909). *Cohens v. Virginia*, 19 U.S. 264 (1821).

In addition, this Court has the responsibility in its superintendency role over the federal courts and the federal system to formulate the

controlling rules for hearings and proof which precede the entry of default judgments and dismissals in order that those rules of procedure provide the parties with due process in their reach and result. *Klapprott v. United States*, 335 U.S. 601, 611 (1949) (Black, J.) citing *McNabb v. United States*, 318 U.S. 332, 341 (1943).

Goldblatt submits that imposing the most severe sanction of the dismissal of his appeal upon an innocent and faultless litigant such as himself for the neglect and oversight of the Clerk's Office in communicating with him about his appellate Brief – indeed, promising "to take care of" the filing for him after the District Court had ruled upon a pending motion – is at odds with fundamental fairness and denied him due process. While this Court has yet to rule on this precise question, as the tribunal with the final authority in how rules of civil procedure are implemented so that they provide fundamental fairness and due process to litigants, it should allow Goldblatt's Petition and take this opportunity to define with precision the kind of neglect by a third party which will be imputed to litigants in order to punish them with dismissal of their appeal for its commission.

This Court should therefore grant the petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit and, ultimately, vacate and reverse this judgment and remand the matter to the United States District Court for the Northern District of Texas at Fort Worth, with instructions that the petitioner be given the opportunity to prosecute his claims against the Trustee in Bankruptcy Court and to reestablish the true value of his property in that forum; or provide the

petitioner with such other relief as is fair and just in the circumstances of this case.

Most actions taken by the parties' legal representative in the course of litigation are rightly and understandably imputed to those parties themselves since those who decide to retain a lawyer should be able to rely on that lawyer to tend to the legal business at hand in a manner consistent with their interests. The presumption is that the client has notice of all facts known to his lawyer-agent; and even the negligence of the parties' attorney will be imputed to those parties.

In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-634 (1962), for example, Justice Harlan, writing for the Court's plurality, stated that plaintiff's counsel's unexcused failure to appear at a pre-trial conference in an auto tort case because of a scheduling conflict was reason enough to dismiss the

> action with prejudice under Fed. R. Civ. P. 41(b): [t]here is certainly no merit to the contention that dismissal of Petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

Id. quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879). Accord, *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 396-397 (1993).

However, different considerations apply when the negligence or oversight is committed by third parties over which the litigant has no control or for whom he is not responsible. Pioneer involved a late filing by respondents in bankruptcy court beyond the bar date. *Id.* at 384. The Bankruptcy Rule 9006(b)(1) allowed such late filing if it were the result of "excusable neglect." *Id.* at 385. In rejecting the notion that the late filing by counsel could not be attributed to the clients, Justice White distinguished those cases of ordinary negligence by a party or his attorney under Rule 60(b)(1) from those cases under Rule 60(b)(6) demonstrating "extraordinary circumstances" beyond the parties' control. *Id.* at 393-394.

That is, as Justice White observed, "[b]ecause of the language and structure of Rule 60(b), a party's failure to file on time for reasons beyond his or her control is not considered to constitute "negligence." *Id.* citing *Klapprott*, 335 U.S. at 613-614. In this latter situation under Rule 60(b)(6), relief would be warranted if "the party is faultless in the delay." *Id.* at 393-394 citing *Ackermann v. United States*, 340 U.S. 193, 197-200 (1950).

Such is the case here. At the time the petitioner filed his response together with his appellate Brief, the filing Clerk told him that it was the District Court's policy not to file his Brief until the court ruled on his Motion to Supplement the Record. The petitioner informed the filing Clerk that his brief as appellant was being filed in response to an Order to Show Cause. The Clerk

file-stamped the Brief on the back page as "Received" as of June 23, 2004 at 1:10 P.M. and informed the petitioner that the action (and stamp) would show that he had complied with the Court's Order to Show Cause and that the Brief would be filed by the Clerk once the District Court had acted on his Motion to Supplement the Record.

Petitioner specifically asked the Clerk if any other action on his or his attorney's part would be required to perfect the filing of his appellate Brief and the Clerk specifically told him that the Clerk's Office would "take care of it" without any further action by him or his attorney once the Court had ruled on his Motion to Supplement the Record of the Appeal. None of these circumstances bespeak fault, negligence or oversight on the part of the petitioner. On this record, the petitioner was faultless in causing the delay relied upon by both the District Court and the court of appeals in order to justify the dismissal of his appeal.

Klapprott's language is instructive in this regard. There the petitioner, a naturalized citizen of the United States but an alleged German national, had been defaulted from having a denaturalization hearing because he had been incarcerated for four years by the government and was unable to obtain representation to defend against this denaturalization proceeding. 335 U.S. at 603; 614-615. In reversing the default judgment which had entered against him, this Court wrote:

> [A]ll petitioner has asked is that the default judgment be set aside so that for the first time he may defend on the merits. Certainly the undenied facts alleged justify setting aside the default judgment for that purpose. *Petitioner is entitled to a fair trial.* He

> has not had it. Fair hearings are in accord with elemental concepts of justice, and the language of the "other reason" clause of [Rule] 60(b) is broad enough to authorize the Court to set aside the default judgment and grant petitioner a fair hearing.
>
> *Id.* at 615 (emphasis supplied). See *United States v. Karahalias*, 205 F.2d 331, 335 (2nd Cir.1953) (Hand L., J.). Thus a party will not be held responsible – or sanctioned – for events beyond their control and for which they cannot justifiably be held responsible, especially when the sanction will deprive that party of a full and fair hearing on his legitimate claims.

In the wake of the Court's holdings in *Klapprott*, *Link* and *Pioneer*, five federal circuit courts of appeals as well as two federal circuits have agreed that the grossly negligent conduct by even a party's own attorney is the kind of "extraordinary circumstance" for which a faultless and unknowing litigant should not be held responsible and that relief from a judgment or dismissal entered for this reason should be allowed in order to give a party his day in court consonant with due process and fundamental fairness. *Greenspun v. Bogan*, 492 F.2d 375, 382 (1st Cir. 1974). *Carter v. Albert Einstein Med. Ctr.*, 804 F.2d 805, 806-808 (3rd Cir. 1986). *In re Virginia Info. Sys. Corp.*, 932 F.2d 338, 342 (4th Cir.1991). *Shepard Claims Serv., Inc. v. William Darrah & Assocs.*, 796 F.2d 190, 195 (6th Cir.1986).*Community Dental Services v. Tani*, 282 F.3d 1164, 1168-1171 (9th Cir. 2002). *L.P. Stewart, Inc. v. Matthews*, 329 F.2d 234, 235 (D.C. Cir.

1964). *Primbs v. United States*, 4 Ct. Cl. 366,370 (1984). See also *King v. Mordowanec*, 46 F.R.D. 474, 477-478 (D. R.I. 1969); *United States v. Cirami*, 563 F.2d 26, 34-35 (2nd Cir.1977).

A fortiori, where the negligent or inexcusable conduct is committed not by a party's attorney but rather by personnel in the Clerk's Office, conduct which causes a litigant's filed appellate Brief to be disregarded by the District Court because it was not filed in the proper form, it is the kind of "extraordinary circumstance" for which a faultless and unknowing litigant should not be held responsible and for which he should not be sanctioned with a default or the dismissal of his appeal.

The due process deprivation caused by sanctioning the petitioner with dismissal of his appeal in the circumstances here is severe. The petitioner's cause of action and his right to have his real estate valued properly both in the Texas state courts and in Bankruptcy Court is a valuable property right entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972). It cannot be taken away without notice and a hearing. *Id. Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Due to the drastic sanction of dismissal, there has never been a full and fair hearing on the petitioner's claims for back rent coupled with the true valuation of the real estate. He has already adduced documentary proof (in the form of the Constable's Deed and other materials) that the property valuation found by the original trial court is grievously incorrect, and that error cascaded throughout this case to the continuing harm of the petitioner's property rights and has been aggravated by the ongoing errors that affected the

petitioner's procedural and substantive due process rights.

All of these facts turn on the issue of whether the tenant maintained any contractual rights to purchase the real estate after the petitioner's lawful foreclosure. The state probate trial court found – three times – that it did not. Its summary judgment provided succinctly that those rights had been extinguished in 1994. In its 1999 rendition, it refused to alter that proposition; and in its 2000 final judgment, it recognized the petitioner's property rights again. Yet its permanent injunction effectively transferred enjoyment, use and control of the property to the tenant in direct violation of the petitioner's clearly recognized property rights. This conflict has never been resolved and can only be resolved by this Court ordering a full and fair hearing on these competing claims consistent with due process.

To hold, as the courts below have held, that the inexcusable neglect of the Clerk's Office in communicating with the petitioner about his appellate Brief and then in failing to file same properly as it had promised to do, should now be visited on the petitioner in the form of a dismissal of his appeal is a denial of due process, is fundamentally unfair and runs counter to the sense of fairness underlying this Court's decisions in *Link*, *Klapprott*, and *Pioneer*. The result is also at odds with the emerging consensus among the lower courts that imposing this most severe sanction of dismissal upon an innocent and faultless litigant like the petitioner for the mistakes of others for whom he is not responsible is a violation of due process.

Justice Black's observations in his dissenting opinion in *Link*, 370 U.S. at 648-649, are apt:

> . . . I think it would be far better in the interest of the administration of *justice*, . . . to adopt the rule that no [litigant] is ever to be penalized, as this plaintiff has been, . . . unless notice is given to the [litigant] himself that such a threat hangs over his head. Such a rule would do nothing more than incorporate basic constitutional requirements of fairness into the administration of justice in this country . . . . [I]t is of very great importance to everyone in this country that we do not establish the practice of throwing litigants out of court without notice to them solely because they are credulous enough to entrust their cases to [others] whose names are accredited as worthy and capable by their government. *Id.* (emphasis in original). See *Ackermann*, 340 U.S. at 205 ("It does no good to have liberalizing rules like 60(b) if, after they are written, their arteries are hardened by this Court's resort to ancient common-law concepts.") (Black, J., dissenting).

Conclusion

For all of the reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit and, ultimately, to vacate and reverse this judgment and remand the matter to the United States District Court for the Northern District of Texas at Fort Worth, with instructions that the petitioner be given the

opportunity to prosecute his claims against the Trustee in Bankruptcy Court and to reestablish the true value of his property in that forum; or provide the petitioner with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

Frank P. Hernandez

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KENNETH ALLEN GOLDBLATT

VS.

ACTION NO.
4:04-CV-337-Y

CAREY EBERT, TRUSTEE

ORDER OF DISMISSAL

This bankruptcy appeal was entered on this Court's docket on May 4, 2004, as indicated by the letter from the clerk transmitted to counsel for the parties the next day. As a result, Appellant's brief on appeal was due on May 19. See Bankr. R. 8009(a). As of the date of this order, Appellant's brief has not been filed. Appellant's brief is over nine months late. Inasmuch as this is not the first instance of Appellant's dilatoriness in prosecuting this appeal, the Court concludes that this appeal should be dismissed.[1] See *In re Quevedo*, 35 B.R. 117, 118-20 (D.P.R. 1983) (dismissing appeal where the brief was filed ten days late; noting that appellant also had been tardy filing his designation of contents for inclusion in the record and his statement of issues).

It is therefore, ORDERED that the appeal in this cause is hereby DISMISSED.

SIGNED February 24, 2005

Terry R. Means
United States District Judge

[1] When the record on appeal originally was transmitted to this Court, the bankruptcy court clerk noted that the record was deficient due to Appellant's failure to timely comply with Bankruptcy Rule 8006.

APPENDIX B
District Court Denial of New Trial
May 4, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KENNETH ALLEN GOLDBLATT	§
	§ ACTION NO.
VS.	§ 4:04-CV-337-Y
	§
CAREY EBERT	§

ORDER DENYING MOTION FOR NEW TRIAL

Pending before the Court is Appellant's Motion for New Trial, which was filed in this cause on March 7, 2005. After review of the briefs submitted regarding the motion, the record in this cause, and the applicable law, the Court concludes that the motion should be denied.

Appellant complains about the dismissal of his appeal due to his failure to timely comply with Bankruptcy Rule 8009(a). As noted in the Court's Order of Dismissal filed on February 25, 2005, Appellant's brief was originally due on May 19, 2004, but had not been filed as of the date of the order of dismissal. Appellant contends that this Court's review of the record is erroneous, in that he timely filed his appellate brief. Appellant apparently refers to his response to the Court's second show-cause order, which response he filed on June 23, 2004. Appellant attached a copy of his appellate brief as an exhibit to that response. That response was, however, unfiled by an order filed on June 28, 2004, which order specifically indicated that the "appellate brief must be separately filed as its own document; it may not simply be attached as an exhibit to another

document." The response to the show-cause order was not thereafter refiled, and the appellate brief never was filed separately with the clerk. Thus, it is Appellant's review of the record that is in error.

Appellant also contends that on June 23, 2004, he attempted to separately file his appellate brief but the "Clerk would not file the Appellant's Brief until this Court ruled on the Appellant's Motion to Supplement the Record. Appellant's Brief was then "unfiled" but stamped on the back page as "Received" as of June 23, 2004 at 1:10 p.m." (Mot. for New Trial at 3.) The Court doubts that Appellant's recollection of events is accurate, inasmuch as this Court has specifically instructed its clerk never to refuse documents submitted for filing unless those documents constitute discovery material. In any event, Appellant has wholly failed to submit any evidence supporting his version of events, nor has he specifically identified the deputy clerk who he alleges refused to file his brief or submitted a copy of the brief that he alleges was received-stamped on the back. Consequently, the Court cannot conclude that its dismissal of this appeal was erroneous or constituted a miscarriage of justice. See *Int'l Bhd. of Teamsters v. Braniff Airways, Inc.*, 774 F.2d 1303, 1305 (5th Cir. 1985) (concluding that district court did not abuse its discretion when it dismissed a bankruptcy appeal due to appellant's failure to timely file its appellate brief).

It is, therefore, ORDERED that Appellant's Motion for New Trial [document number 19] is hereby DENIED.

SIGNED May, 2005.

5-4-05

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX C

Court of Appeals Decision
August 18, 2006
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re Goldblatt,

No. 05-10747
IN THE MATTER OF: KENNETH ALLEN GOLDBLATT, DEBTOR,
KENNETH ALLEN GOLDBLATT, APPELLANT,
v.
CAREY EBERT, TRUSTEE, APPELLEE.

Appeal from United States District Court for the Northern
District of Texas No. 4:04-CV-337.

Per curiam
Unpublished Opinion
Summary Calendar
Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

Kenneth A. Goldblatt challenges the determination of the district court that he failed to file his brief on appeal, and the resultant orders that dismissed his bankruptcy appeal, without prejudice, and denied his motion for new trial. We affirm.

I FACTUAL AND PROCEDURAL BACKGROUND

Goldblatt's appeal to the district court was docketed on May 4, 2004. On June 9, 2004, the

district court noted that the appellate brief had not yet been filed, and ordered that Goldblatt file his brief no later than June 23, 2004, in order to pursue his appeal. The order stated that failure to "timely and completely comply with this order" would result in dismissal.*fn2

The docket reveals that, on June 23, 2004, Goldblatt responded to the district court's order that the brief be filed. This response was unfiled by order of the district court on June 28, 2004. The notice of deficiency indicated that the brief must be separately filed as its own document and not attached as an exhibit to another document. The record contains only the first page of this response, stamped "UNFILED" over the June 23, 2004, 1:05 p.m., clerk of court stamp. On February 25, 2005, the district court dismissed Goldblatt's appeal, without prejudice, for failure to timely comply with Bankruptcy Rule 8006. The district court stated that Goldblatt's brief was due May 19, 2004, and, as of the February 2005 dismissal, the brief had not been filed.

Goldblatt appeals, contending that the district court erred in dismissing his appeal and in denying his motion for new trial because his brief was filed as a timely response to the district court's order that the brief be filed by June 23, 2004.

II. STANDARD OF REVIEW

In reviewing an action taken by a district court in its appellate role, we affirm unless the court has clearly abused its discretion. *In re Braniff Airways, Inc.*, 774 F.2d 1303, 1305 (5th Cir. 1985). Similarly, we affirm unless the district court abused its discretion in its administrative handling of a case, including its enforcement of the

local rules and its own orders. See *Macklin v. City of New Orleans*, 293 F.3d 237, 240 (5th Cir. 2002). "Dismissal is a penalty of last resort, to be imposed only after clear delay or contumacious conduct and a finding that lesser sanctions would not cure the problem". *Braniff*, 774 F.2d . at 1305. "[T]his court has held that, in reviewing a district court's dismissal of a bankruptcy appeal for non-jurisdictional defects under Federal Rule of Bankruptcy Procedure 8001(a), we should review the district court's action with attention to the prejudicial effect of delay on the appellees and the bona fides of the appellant." *In re: CPDC Inc.*, 221 F.3d 693, 698 (5th Cir. 2000) (internal quotation marks omitted) (quoting *Braniff*, 774 F.2d at 1304).

III. DISCUSSION

Bankruptcy Rule 8001(a) states, in pertinent part, that "[a]n appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court . . . deems appropriate, which may include dismissal of the appeal." The Federal Rules of Bankruptcy Procedure were amended in 1995 to state that "[a] local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a non-willful failure to comply with the requirement." Fed. R. Bankr. P. 8018(a)(2); 9029(a)(2). The plain language suggests that rules of form are just that – rules that require court submissions to be in a certain form. *El-Kaissi v. Martinaire, Inc.*, 2005 WL 2897055 *6 (S.D. Tex Nov. 3, 2005).

The purpose of this new language was "to protect against loss of rights in the enforcement of

local rules relating to matters of form." Fed. R. Bankr. P. 9029 Advisory Committee's Note. The language was narrowly drawn to cover only violations that are not willful and that involve local rules directed to matters of form. *Id.* This 1995 amendment to Bankruptcy Rule 8018 does not limit the court's power to impose substantive penalties upon a party for stubborn or repeated violations of a local rule by the party or its attorney. *Id.**fn3 Likewise, Rule 8018 does not affect the court's power to enforce local rules that involve more than mere matters of form, such as a requirement that a jury trial be demanded within a specified time period to avoid waiver of the right to a trial by jury. *Id.*

The notice of deficiency is a form on the same page as the order that unfiled Goldblatt's June 23, 2004 response. It has thirteen enumerated, printed violations, with a place by each number to check which violation(s) caused the deficiency. The thirteenth violation is "Other" and has space for a handwritten description of the deficiency.

The notice of deficiency indicated that Goldblatt's June 2004 response violated United States District Court, Northern District of Texas Local Rule (LR) 7.1(I) or 56.6(a). Handwriting on the notice strikes out the word "motion" and inserts the word "response." As altered, it reads "The response must include documentary or nondocumentary evidence in a separate appendix. See LR 7.1(I) or LR 56.6(a)." The violation is further explained by additional handwriting as "your appellate brief must be separately filed as its own document; it may not simply be attached as an exhibit to another document."

In deciding to dismiss the appeal and deny the motion for new trial, the district court relied on Goldblatt's failure to separately file the brief when he filed the response to the district court's order, even though the purpose of the response was to file the brief. The dismissal stated that Goldblatt's brief was over nine months late and that because this was not the first instance of his dilatoriness in prosecuting this appeal, the appeal should be dismissed. In the order denying the motion for new trial, the district court elaborated on the tardiness of the brief as follows:

> [Goldblatt] contends that this Court's review of the record is erroneous, in that he timely filed his appellate brief. [Goldblatt] apparently refers to his response to the Court's second show-cause order, which response he filed on June 23, 2004. [Goldblatt] attached a copy of his appellate brief as an exhibit to that response. That response was, however, unfiled by an order filed on June 28, 2004, which order specifically indicated that the appellate brief must be separately filed as its own document; it may not simply be attached as an exhibit to another document. The response to the show-cause order was not thereafter refiled, and the appellate brief never was filed separately with the clerk. Thus, it is [Goldblatt]'s review of the record that is in error.

Goldblatt did not file his brief timely according to Bankruptcy Rule 8009(a), though it appears his brief was filed as an attachment within the extension delay. Nevertheless, we find no abuse of the district court's discretion in dismissing the appeal.

Arguably, Goldblatt initially did not willfully fail to file his brief. The district court

acknowledged that the brief was filed on June 23, 2004, and the Trustee does not indicate that she did not receive the brief. That brief placed her on notice that the issue was whether the bankruptcy court erred by "refusing to compel the Trustee to abandon a claim for rent on commercial real estate that at all times relevant was a valuable asset of the bankruptcy estate or owned by Goldblatt."*fn4 Goldblatt did not refile the brief as ordered in the notice of deficiency. Goldblatt claims that the original record shows his March 2005 attempt to re-file the brief after the February 2005 dismissal, but that is of no moment: Goldblatt had from the June 2004 unfiling to the February 2005 dismissal for refiling, but did not refile during that time. While there was likely little or no prejudice to the Trustee from the delay between the May 2004 docketing of the case, and the June 2004 filing of the brief, we cannot say the same about the delay between the June 2004 unfiling and the alleged March 2005 attempt to refile the brief. It does not constitute an abuse of the district court's discretion to determine that Goldblatt's failure to refile the brief – after being told to do so – demonstrates a certain stubbornness or willfulness sufficient to warrant dismissal.

IV. CONCLUSION

Finding no abuse of discretion, we AFFIRM the district court's orders dismissing the appeal without prejudice and denying the motion for new trial. Costs shall be borne by the Appellant.

Opinion Footnotes

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*fn1 Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be

published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

*fn2 This was the district court's "second show cause order." The first was an order that directed Goldblatt to file certain transcripts and/or other evidence. Thus, the "first show cause order" is unrelated to the dismissal for failure to file the brief, and is not at issue herein.

*fn3 See also Fed. R. Bankr. P. 8018 Advisory Committee's Note ("This rule is similar to Rule 47 [of the Federal Rules of Appellate Procedure] and Rule 83 [of the Federal Rules of Civil Procedure]. Local rules governing procedure before the bankruptcy courts maybe promulgated under [Bankruptcy] Rule 9028."); Fed. R. Civ. P. 83 Advisory Committee's Note, 1995 Amendment:

Paragraph (2) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a party should not be deprived of a right to a jury trial because its attorney, unaware of – or forgetting – a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body of the pleading. The proscription of paragraph (2) is narrowly drawn – covering only violations attributable to non-willful failure to comply and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney contumaciously or willfully violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form – for example, a local rule requiring parties to identify evidentiary

matters relied upon to support or oppose motions for summary judgment.

*fn4 We note here only that an issue was stated in the brief. We make no finding whether this statement of the issue is sufficient, as that question is not before this court.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-10232
Summary Calendar

In The Matter Of: KENNETH ALLEN GOLDBLATT
Debtor
KENNETH ALLEN GOLDBLA
Appellant
v.
CAREY D EBERT, Trustee
Appellee

United States Court of Appeals
Fifth Circuit
FILED
October 31, 2007
Charles R. Fulbruge III
Clerk

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:06-CV-751

Before KING, DAVIS, and CLEMENT, Circuit Judges.

PER CURIAM:[1]

[1]Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Kenneth Goldblatt challenges the district court's dismissal of his untimely bankruptcy appeal. We AFFIRM.

No. 07-10232

This is Goldblatt's second appeal to this Court regarding the bankruptcy court's denial of his motions to compel a bankruptcy trustee to

abandon claims. Goldblatt's first appeal from the bankruptcy court was dismissed by the district court for failure to timely comply with Federal Rule of Bankruptcy Procedure 8006. This Court affirmed the district court's decision on August 18, 2006. *Goldblatt v. Ebert* (*In re Goldblatt*), 203 Fed. Appx. 515, 548 (5th Cir. 2006). On September 18, 2006, Goldblatt filed a motion for rehearing in the bankruptcy court which was denied on October 2, 2006. He filed a notice of appeal with the bankruptcy court on October 20, 2006. On January 16, 2007, the district court held a telephone hearing with the parties and Goldblatt's appeal was dismissed. The minutes of that hearing indicate that the appeal was dismissed for "untimeliness of, *inter alia*, bankruptcy appeal, designation of record on appeal, and filing of appellant brief. Goldblatt now claims the district court erred in dismissing his appeal.

We review actions taken by a district court in its appellate role for abuse of discretion. *Int'l Bhd. of Teamsters v. Braniff Airways, Inc.* (*In re Braniff Airways, Inc.*), 774 F.2d 1303, 1305 (5th Cir. 1985). "[This court has held that, in reviewing a district court's dismissal of a bankruptcy appeal for nonjurisdictional defects under Federal Rule of Bankruptcy Procedure 8001(a), we should review the district court's action with attention to the prejudicial effect of delay on the appellees and the bona fides of the appellant." *Zer-Ilan v. Frankford* (*In re CPDC Inc.*), 221 F.3d 693, 698 (5th Cir. 2000) (internal quotations omitted). However, "Jurisdictional questions are questions of law which are reviewed de novo." *Estate of Smith v. Commr of Internal Revenue*, 429 F.3d 533, 537 (5th Cir. 2005).

The Federal Bankruptcy Rules state that:

> An appeal from a judgment, order, or decree of a bankruptcy judge to a district court . . . shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. An appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal. . . . FED. R. BANKR. P. 8001(a). Federal Rule of Bankruptcy Procedure 8002(a) requires that a "notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from." "The District Court lacks jurisdiction of an appeal that is not timely filed." *Robinson v. Robinson* (*In re Robinson*), 640 F.2d 737, 738 (5th Cir. 1981); see also *Rowles, Winston & Co. v. Morrow* (*In re Morrow*), 564 F.2d 189, 190 (5th Cir. 1977).

Goldblatt's motion for rehearing was denied on October 2, 2006. He filed a notice of appeal on October 20, 2006. Because Goldblatt did not file his notice of appeal within ten days of the entry of judgment, the district court lacked jurisdiction to hear his appeal. There is no need to review the district court's alternative bases for dismissal.

The district court's order dismissing the appeal is AFFIRMED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 07 – 10232
In the Matter of: KENNETH ALLEN GOLDBLATT
Debtor

KENNETH ALLEN GOLDBLATT
Appellant
v.
CAREY D EBERT, Trustee
Appellee

U.S. COURT OF APPEALS
FILED
Nov 28 2007
CHARLES R. FULBRIDGE III
CLERK

Appeal from the United States District Court
for the
Northern District of Texas, Fort Worth

ON PETITION FOR REHEARING
AND REHEARING EN BANC

Before KING, DAVIS and CLEMENT, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. App. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.
( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R.

App. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.
( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
Unite States Circuit Judge

E. B. Clement
United States Circuit Judge

APPENDIX F

NO. 07-10232
IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT COURT OF APPEALS

In The Matter of KENNETH A. GOLDBLATT
Debtor

KENNETH A. GOLDBLATT
APPELLANT
v.
CAREY EBERT, TRUSTEE
APPELLEE

APPELLANT'S PETITION FOR REHEARING
OR,
IN THE ALTERNATIVE, HEARING EN BANC

Frank P. Hernandez, Esq.
716 Wayne Avenue
Dallas, Texas
214-821-1213
Fax 214-821-1214
TBC#09516000
Attorney for Appellant

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW, Kenneth Allen Goldblatt, Appellant in the above-numbered and entitled cause and would respectfully show the Court the following:

The present panel has based its most recent decision on erroneous understanding of facts of the filling date of Appellant's previously denied Motion for Rehearing, and thereby is denying Appellant his day in court.

The panel's decision is based solely on the timing of the denial of Appellant's Motion for Rehearing in October 2006. However, the Court's own case file demonstrates that the Panel is either wrong in its understanding of the time frames involved in denial of Appellant's previous motion or is requiring the impossible of Appellant through its current decision. In either event, Appellant seeks a rehearing on his appeal so that justice can be done. A copy of the Panel's decision is attached as Exhibit A as required by the Court's rules.

While the Panel asserts that "Goldblatt's Motion for Rehearing was denied on October 2, 2006" the document shows that the "Judgment" was filed on August 18, 2006. The document face further shows that the document was not "ISSUED AS MANDATE" until "October 11, 2006". "A True Copy" stamp on the bottom of the page further identifies the designation by the "Clerk, U.S. Court of Appeals, Fifth Circuit" as having date-stamped the document on October 11, 2006. The document also shows that it was filed by the Clerk's Office of the Northern District of Texas on October 13, 2006, indicating that it was likely received by mail on that date. The page in question is shown in the image/illustration below:

ORIGINAL

United States Court of Appeals
Fifth Circuit

UNITED STATES COURT OF APPEALS

FILED
August 18, 2006

FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III
Clerk

No. 05-10747
Summary Calendar

D.C. Docket No. 4:04-CV-337

In The Matter Of: KENNETH ALLEN GOLDBLATT

Debtor

KENNETH ALLEN GOLDBLATT

Appellant

v.

CAREY EBERT, Trustee

Appellee

U.S. DISTRICT COURT
NORTHERN DISTRICT
FILED
OCT 13 2006
CLERK, U.S. DISTRICT COURT
By _____ Deputy

Appeal from the United States District Court for the Northern District of Texas, Fort Worth.

Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellant pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: OCT 11 2006

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: _____ Deputy

New Orleans, Louisiana

OCT 11 2006

Assuming Appellant could have acted on the date of issue by the Fifth Circuit – which is unlikely since he had absolutely no way of knowing the exact date the Court might choose to issue short of being mentally telepathic – his filing on October 20, 2006 demonstrates that, not only was he NOT LATE in filing his Notice of Appeal, but that he in fact made the filing quite expeditiously. Supposing he got notice of the

decision on the day of its issue, his filing was made NINE DAYS later – and timely in any event. And further supposing that Appellant received notice the same day as it was filed in the District Clerk's Office in Fort Worth, it would have been filed a timely SEVEN DAYS later.

ARGUMENT

Adjudication of the facts of this case on the merits will demonstrate that the improper valuation of the real estate that has been the subject matter of more than a decade of litigation has led to a miscarriage of justice that must be corrected by this Court.

"[C]ourts must remain flexible when reviewing failures of persons unfamiliar with administrative complexities to comply with procedural rules. We should not regard such rules as rigid jurisdictional prerequisites." *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74, 77 (5th Cir. 1982).

In the Fifth Circuit, the Court reviews actions taken by the district courts in their appellate role for abuse of discretion. *In re Braniff* Airways, Inc., 774 F.2d 1303, 1305 (5th Cir. 1985) (citing *Pyramid Mobile Homes, Inc. v. Speake*, 531 F.2d 743, 746 (5th Cir. 1976) (*per curiam*)). A district court abuses its discretion when its decision is based on an erroneous view of the law. *In re Sealed Appellant*, 194 F.3d 666, 670 (5th Cir. 1999) (citations omitted). Furthermore, the Fifth Circuit has held that, in reviewing a district court's dismissal of a bankruptcy appeal for non-jurisdictional defects under Federal Rule of Bankruptcy Procedure 8001(a), the 5th Circuit panel should "review the district court's action with attention to 'the prejudicial effect of delay on

the appellees and the bona fides of the appellant.'" *Braniff*, 774 F.2d at 1304 (citing *Pyramid* 531 F.2d at 746). *Zer-Ilan v. Frankford*, 221 F.3d 693, (5th Cir. 2000). In this case, the prejudicial effect on Appellant is significant, while the issue of delay – after thirteen years of continuous litigation and several years of adjudication of this single matter – is irrelevant to the issue.

Rule 8001(a) states that "[a]n appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court . . . deems appropriate, which may include dismissal of the appeal." As the language of the rule makes clear, only the failure to file a notice of appeal, which deprives the reviewing court of jurisdiction, mandates dismissal. In contrast, the district court does not invariably dismiss for breaches of other procedural rules, including Rule 8006. *In re Tampa Chain Co., Inc.*, 835 F.2d 54, 55 (2nd Cir. 1987) (*per curiam*). Rather, the court must exercise discretion and consider what sanctions are appropriate. [emphasis added] Dismissal is a harsh and drastic sanction that is not appropriate in all cases, even though it lies within the district court's discretion. In addition, when, as here, an appeal is dismissed because of an initial attorney error, the client is unduly punished for his attorney's mistakes. Editors' Comment, Norton Bankruptcy Rules at 523 ("While counsel for the appellant may be sanctioned, a dismissal of the appeal would unfairly penalize the client."); *In re Hill*, 775 F.2d 1385, 1387 (9th Cir. 1985) (*per curiam*) (The court commits an abuse of discretion when "the default was the fault of the attorneys and not the litigant, [y]et the impact of the sanction imposed is primarily against the client.").

In this case, the court never issued any sanctions against the attorney and at no time has either district court considered sanctions – or any other alternative but dismissal. This action has been dismissed twice by the district courts on procedural grounds that continue to deny Appellant a trial on the merits of the subject matter of this action. And in both instances, dismissal resulted from a mistake on the part of the courts and their functionaries, not Appellant or his counsel.

In the absence of evidence of prejudice or obstinately dilatory conduct, and given that the purpose of Rule 8006 has been satisfied, the Fifth Circuit has previously concluded that dismissal was not justified. *In re Winner Corp.*, 632 F.2d 658, 661 (6th Cir. 1980) (reinstating appeal when there was no evidence of bad faith). Following this teaching, the panel must reach the same conclusion on these facts.

There is no evidence in the instant appeal of either an intent to delay or obstinately dilatory conduct on the part of Appellant that could justify dismissal. *Fitzsimmons*, 920 F.2d at 1474 (finding that a district court was not required to consider other factors when appellants had exhibited "bad faith behavior"). Rather, the record establishes that Appellant timely filed his notice of appeal and record designation, and timely filed his Appellant's Brief in response to the District Court's Order to Show Cause, and complied with the rules of bankruptcy procedure with regard to all other aspects of prosecuting his appeal. Cf. *In re Champion*, 895 F.2d 490, 492 (8th Cir. 1990) (*per curiam*) (no abuse of discretion for dismissing appeal when appellant had not filed a designation of record excerpts or statement of issues nine months after filing of notice of appeal); *Greco v.*

Stubenberg, 859 F.2d 1401, 1403-04 (9th Cir. 1988) (no abuse of discretion for dismissing appeal when appellant's counsel repeatedly failed to order transcripts, misrepresented to court that transcripts had been ordered, and did not notify court of inability to do so for nine months); *Pyramid*, 531 F.2d at 746 ("[F]or over four months after filing its appeal appellant had made no effort to comply with the Rules."). None of those factors exist in this case.

Instead, there is abundant evidence on the record in the District Court to illustrate the error of the District Court's Order of Dismissal of Appellant's Appeal as an abuse of discretion because Appellant and his attorney both made good faith efforts to comply with the rules, and were thwarted by the actions (and apparent mistake) of a filing clerk in the filing (unfiling) of his Appellant's Brief. When this Court denied appeal without prejudice on that issue, and this Court affirmed, Appellant immediately filed his second, appeal (as he was free to do since the district court had dismissed the first appeal "without prejudice") in the district court, and now here.

First, it is clear from the record that Appellant timely and fully complied with the District Court's Order to Show Cause of June 9, 2004 by filing his Response to that Order on June 23, 2004 with the Appellant's Brief attached, and by attempting to file a separate copy of the Appellant's Brief at the very same time. A copy of that Brief (as separately filed) exists in the District Court's (and Appellant's) own file with the file stamp on the front page covered by a blank sticker, and a file stamp on the reverse of the back page showing it was received by the Clerk on June 23, 2004 at 1:10 p.m. Appellant is at a loss to

explain to this Court why the District Court has dismissed his appeal in the face of such evidence in the District Court's own file.

It is equally clear from the record that Appellant undoubtedly intended to file and prosecute his appeal in the District Court, and did so as diligently as possible under the circumstances. The dismissal of his appeal "without prejudice" to its re-filing was an erroneous and unnecessary action by the Court and an abuse of that court's discretion under Fifth Circuit law. In the interim, the case has been under continuous adjudication.

It is unclear from the record, however, whether Appellant's counsel ever received notice of the scheduling of filing of Appellant's second brief, and it is equally unclear from the record why Appellant's second appeal was dismissed by the district court. Either of these issues is sufficient reason to overrule the district court and reinstate this appeal.

At the very least, Appellant is entitled to have this Court remand this case back to the bankruptcy court for a hearing on the merits of the underlying subject matter of this action.

CONCLUSION

There is ample evidence in the record to show that Appellant has diligently prosecuted his appeal of this matter to obtain a hearing on the merits, and repeatedly has been denied that hearing at every level. Now Appellant is entitled to such hearing on the merits on the basis of new evidence that was never before available and that he diligently made a part of the record as soon as it became available and known to him.

Substantial evidence exists on the record that Appellant has been denied a hearing on the merits – not by any action or failure on his part or that of his counsel, but – by actions and procedures of the district court and its clerks that have resulted in denial of Appellant's rights to due process in direct contradiction of the teaching of this circuit, statute, case law and authorities.

Appellant wants this Court to reverse the district court's dismissal of his Appeal and remand the case either to the bankruptcy court or the district court for adjudication on the merits.

Respectfully submitted

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No. 07-1097

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

KENNETH ALLEN GOLDBLATT,

Petitioner,

v.

CAREY D. EBERT, TRUSTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the failure of Petitioner to timely appeal is a violation of his due process rights?

Whether the Petitioner has shown sufficient compelling reasons to grant his writ of Certiorari concerning his failure to file a timely appeal?

Whether the Petitioner is attempting to resurrect a claim that has been disposed of by a previous appeal?

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STATEMENT OF THE CASE

Contrary to the Petitioner's statement of the case, the core substantive issue of this case does not relate to the value of a piece of real estate Grapevine, Texas. Rather, it is whether the Petitioner's appeal was untimely.

The Petitioner's version of the case set forth in his petition is revisionist history. The true course of events is best shown in a timeline:

1. before May, 2000, the Petitioner was involved in a complicated series of lawsuits involving a piece of real property located in Grapevine, Texas;
2. on May 31, 2000, a judgment for over a million dollars was entered against the Petitioner;
3. Petitioner filed a Chapter 11 bankruptcy, later converting the matter to a Chapter 7 bankruptcy;
4. Respondent was appointed Chapter 7 Trustee on November 14, 2001;
5. because the value of the property was less than the judgment, Respondent moved to abandon the property;
6. this motion to abandon was approved by the Bankruptcy Court on December 10, 2002;
7. the Petitioner then claimed the judgment creditor owed him rent on the property, despite the fact this claim had been disposed of

in connection with the state court litigation that had resulted in the judgment against him;

8. the Petitioner filed a motion to compel the Respondent to abandon this previously litigated claim to him on November 18, 2002;

9. the Bankruptcy Court denied Petitioner's request on April 24, 2003;

10. the Petitioner moved for rehearing on his Motion to Compel Respondent to Abandon, which was denied on August 12, 2003;

11. the Petitioner timely appealed the matter to the District Court on August 12, 2003;

12. after the Petitioner corrected an initial deficiency in his appeal, the matter was docketed on appeal on May 4, 2004;

13. pursuant to Bankruptcy Rule 8009, the Petitioner's brief was due May 19, 2004;

14. the Petitioner filed no brief (claiming his counsel was too busy with another appeal to this Court), and the District Court entered a Show Cause Order requiring the Petitioner explain why his appeal should not be dismissed for failure to file a brief;

15. the Show Cause Order specified that "your appellate brief must be separately filed as its own document; it may not simply be attached as an exhibit to another document," (Pet. App. at 25);

16. the Petitioner filed a response on June 23, 2004 to this Show Cause Order, which his appellate brief attached thereto as an exhibit;

17. the District Court ordered the Response to be "unfiled" on June 28, 2004, and again specifically ordered that the brief be "filed separately as its own document,";

18. the Petitioner never obeyed either of these orders, and so his appeal was dismissed on February 25, 2005;

19. on August 18, 2006, the Fifth Circuit affirmed this dismissal, finding the Petitioner's refusal to properly file his brief even after having his error pointed out to him demonstrated a "certain stubbornness or willfulness sufficient to warrant dismissal," (Pet. App at 32);

20. the Petitioner sought a rehearing en banc, which was denied on October 2, 2005;

21. at this point the appeal the Respondent will refer to as the "First Appeal" was complete;

22. rather than seeking certiorari, the Petitioner returned to the Bankruptcy Court and filed a Motion for Rehearing, once again asking it to reconsider its prior denial of his Motion to Abandon, i.e., the matter that had been subject to and decided in the First Appeal;

23. this request was denied on October 6, 2006;

24. the Petitioner then files a Notice of Appeal to the District Court on October 20, 2006;

25. the Respondent will call this proceeding the "Second Appeal";

26. pursuant to Bankruptcy Rule 8002, an appeal from a decision of the Bankruptcy Court must be filed within ten (10) days of the date of the order being appealed; the District Court found the Petitioner's appeal was untimely and dismissed it on January 17, 2007;

27. the Fifth Circuit affirmed this disposition, finding that the failure to timely file his appeal meant the District Court lacked jurisdiction over the Petitioner's claims; and

28. the Petitioner now seeks certiorari, claiming he was denied due process because some unknown clerk refused to file the brief that was due in the First Appeal over four years ago.

The Petitioner has not been denied due process; in fact, he has had more process than any other debtor the Respondent has seen. The Petitioner's claims that he was denied due process by an error in the clerk's office are incorrect and have already been decided against him. The Petitioner is not the "Innocent and Faultless Litigant" he claims to be, and his due process claims should be rejected.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT

A. The Petitioner's Argument

The Petitioner's argument is simple: it violates his due process rights to dismiss his appeal. The Petitioner bases this argument on the claim that the only reason his appeal was dismissed is because of a mistake made by the clerk, and that he is an "Innocent and Faultless Litigant" who has been harmed by the error of another.

B. The Petitioner's Due Process Rights Were Not Violated

The problem with the Petitioner's argument is threefold: (1) it is factually wrong; (2) it has already been rejected in the First Appeal; and (3) the reason the Petitioner's appeal was dismissed in the Second Appeal is because he missed a deadline, not because of any problems with his brief. Nothing about this case has resulted in any due process violation.

1. The Petitioner Is Wrong

The primary problem with the Petitioner's argument is it is wrong. The Petitioner made the same argument in the First Appeal, and it was rejected by courts which found the Petitioner's failure to file his brief in the District Court was not the product of a mistake made by the clerk, and because the Petitioner was both informed of, and afforded multiple

opportunities to correct his error. His failure to do so demonstrates that any mistake was the Petitioner's. *Goldblatt v. Ebert* (*In re Goldblatt*), 203 Fed.Appx. 545, 547-48 (5th Cir. Aug. 18, 2006) (per curiam). This argument has been made and was lost in the First Appeal; the Petitioner should not be allowed to relitigate the matter in the Second Appeal.

2. The Petitioner's Due Process Rights Were Not Violated

Even if this were not the case, the Petitioner's arguments should be rejected because nothing about the way this case has been handled has resulted in any due process violation.

a. What Due Process Requires

Although the question of what "process" a person may be "due" can vary widely from case to case, the broad outline of what due process requires is well settled: due process requires that a litigant be afforded "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). In determining whether a person has received the amount of process that is his due, courts consider: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of the interest through the procedures used, and the probable value of additional or different procedures that might be used; and (3) the government's interest, including the function

involved and the burdens additional or different procedures would entail. *Mathews*, 424 U.S. at 335; *accord, City of Los Angeles v. David*, 538 U.S. 715, 716 (2003) (per curiam).

b. The Petitioner Failed to Avail Himself of an Available Remedy – Twice

The Court has held, on many occasions and in many different contexts, that a litigant's failure to avail himself of some process available to him does not support a claim that he was denied due process. In a tax case discussing the sufficiency of pre- and post-deprivation hearings afforded to taxpayers, the Court recognized having a pre-deprivation hearing "constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process clause, and taxpayers cannot complain if they fail to avail themselves of this procedure." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.*, 496 U.S. 18, 35 n. 21 (1990). In a criminal case involving the claim that an accused was denied the opportunity to plead insanity, the Court held due process had not been denied when he could have made the plea, but did not: "A claim of denial of due process can hardly be predicated upon the failure of a defense move." *United States v. Baldi*, 344 U.S. 561, 568 (1953). Nor may a due process challenge be maintained if a person fails to exhaust administrative remedies afforded them. *Aircraft & Diesel Equip Corp. v. Hirsch*, 331 U.S. 752, 774 (1947). In a case involving a challenge to the

penalties for exceeding the fixed rate for railroad service, the Court rejected the idea that the railroad's due process rights had been violated, holding "where such an opportunity [for a hearing] has been afforded and . . . the carrier fails to avail itself of the opportunity, it is then admissible, so far as due process of law is concerned, for the state to enforce adherence to the rate . . . " *St. Louis I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 65 (1919). These decisions are echoed by decisions of lower courts arising in many different contexts, recognizing that a person who fails to avail himself or herself of an available procedure cannot claim to have been denied the due process that procedure would have provided. *See, e.g., Rivera-Powell v. New York City Bd. of Elections*, 470 F.3d 458, 467 n. 9 (2nd Cir. 2006) (election case); *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003) (pleading issue in civil rights case).

Here, the Petitioner has failed to avail himself of remedies available to him not once, but twice. The first time he did not take advantage of a remedy available to him was at the end of his First Appeal: after the Fifth Circuit rejected his arguments, the remedy would be to do what he did here, i.e., seek a writ of certiorari. The Petitioner did not do so, and as a result of this failure he lost his chance to have the Court review his arguments in the appeal where they arose. The second time was after the Petitioner then sought rehearing of the matter in the Bankruptcy Court, but failed to timely appeal the denial of this decision to the District Court. His failure to timely

appeal was the basis of the decision below. *Goldblatt v. Ebert* (*In re Goldblatt*), 253 Fed.Appx. 340, 341-42 (5th Cir. Oct. 31, 2007) (per curiam).

Both times the Petitioner had a mechanism for having his argument heard, yet both times he failed to pursue it. This failure precludes his arguing he was denied due process because he was not *denied* due process; rather, he *failed to use* the process afforded him.

c. The Petitioner Has No Due Process Right to an Appeal

Alternatively, the Petitioner's due process argument should be rejected because it is based on the erroneous belief that he has a due process right to appeal the decision of the Bankruptcy Court. With respect to this argument, it is important to remember that not even the Petitioner claims he was denied notice and an opportunity to be heard in the Bankruptcy Court (not once, but twice). Rather he complains about how his First Appeal from the Bankruptcy Court to the District Court was handled.

However, even if the Petitioner's claims were accurate, they would be unavailing because he has no due process right to appeal to the District Court. All due process requires is that a litigant be afforded one fair trial on the merits; appellate review of this decision is not required. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *State of Ohio ex rel. Bryant v. Akron Metro. Park Dist. for Summit County*, 281 U.S. 74, 81 (1930). If appellate review is allowed, Congress may

permissibly impose limitations on this right, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 551-52 (1949) (due process did not prevent Congress from imposing a bond requirement), including the right to make the deadline to appeal a short one. *Clarkson Constr. Co. v. Occupations Safety & Health Rev. Comm'n*, 531 F.2d 451, 456 (10th Cir. 1976) (*citing Lichter v. United States*, 334 U.S. 742 (1948) *and Yakus v. United States*, 321 U.S. 414 (1944)).

This general rule has been specifically applied in bankruptcy cases where the claim is that requiring a litigant to obey an appellate deadline violated his constitutional rights. *Mitchell v. Burt Vetterlein & Bushnell PC* (*In re Stein*), 197 F.3d 421, 426 n. 11 (9th Cir. 1999) ("[W]here the procedural right to appeal is limited in time, and the onus is upon the party to determine when that time commences to run. *Any loss of rights by Gordon was due to his own neglect.*") (emphasis added); *see also In re Stafford*, 240 F. 155, 157 (D. Conn. 1917) (case decided under the Bankruptcy Act). Put more simply, the only due process the Petitioner was constitutionally entitled to receive was a hearing in the Bankruptcy Court, and he received two of those. Even if he was denied further appellate review by a mistake of the clerk this does not implicate the Petitioner's constitutional rights.

3. Cases Cited by the Petitioner Are Inapplicable

The Petitioner cites a series of cases he believes support his position, all of which are decided under Rule of Procedure 60 and address when a litigant has shown "excusable neglect" justifying setting aside a judgment. *Pioneer Inv. Svcs. Co. v. Brunswick*, 507 U.S. 380 (1993); *Community Dental Svcs. v. Tani*, 282 F.3d 1164 (9th Cir. 2002); *Counts v. Wang Labs., Inc.* (*In re Virginia Information Sys. Corp.*), 932 F.2d 338 (4th Cir. 1991), *abrogated, Barnhill v. Johnson*, 503 U.S. 393 (1992); *Carter v. Albert Einstein Med. Ctr.*, 804 F.2d 805 (3rd Cir. 1986); *Shepard Claims Svc., Inc. v. William Darrah & Assoc.*, 796 F.2d 190 (6th Cir. 1986); *United States v. Cirimi*, 563 F.2d 26 (2nd Cir. 1977); *King v. Mordowanec*, 46 F.R.D. 474 (D. R.I. 1969); and *Primbs v. United States*, 4 Cl. Ct. 366 (1984), *aff'd*, 765 F.2d 159 (Fed. Ct.), *cert. denied*, 471 U.S. 1068 (1985).[1] These cases are all distinguishable, for many reasons: (1) there was no mistake by the clerk that affected the Petitioner; (2) all the cases cited by the Petitioner involve mistakes made by the litigant's lawyer, but the Petitioner never argues his failure to file his brief was his lawyer's fault; (3) the

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[1] Interestingly, one of the Petitioner's cases actually supports the Respondent. *Greenspan v. Bogan*, 492 F.2d 375, 383 (1st Cir. 1974) (failure to appear was unexcused where litigant knew there would be a hearing and he was sent 13 separate notices and other documents on three occasions, yet received none of them and took no other action until after judgment was entered).

Petitioner has never argued that this matter is governed by the standards set forth in Rule 60; (4) none of the cases cited by the Petitioner involve arguments that had been rejected in a prior appeal; and (5) none of the cases cited by the Petitioner involve a litigant's failure to timely invoke available remedies. In short, while these cases show a blameless litigant may have an adverse judgment set aside where it was the product of his lawyer's gross error, they do not support the argument that the Petitioner has been denied due process here.

CONCLUSION

This case presents a clear example of a litigant seeking the proverbial "second bite at the apple": the Petitioner made an argument in the First Appeal, lost, went back to the Bankruptcy Court, complained again, lost again, filed the Second Appeal and now complains about the same alleged error in the First Appeal. Unfortunately for the Petitioner, there was never any error. If there was, it was resolved by the First Appeal and even if it could be advanced in the Second Appeal the Petitioner failed to obey the deadlines governing his appeal, a failure that led to his appeal being dismissed. "Due process does not require that there be a right to interminably litigate the issue (before, during and after)." *Clarkson Constr. Co.*, 531 F.2d at 456. The Petitioner has had his day in court, he lost – first because of his own obstinacy and then

because of his own failure to obey the rules – and so this case should be allowed to come to an end.

Respectfully submitted,

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In the

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Kenneth Allen Goldblatt,

Petitioner,

-v-

Carey D. Ebert, Trustee,

Respondent

On Petition for Writ of Certiorari
to the United States
Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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Question Presented.

Was the "late filing" of the petitioner's Brief which caused the court of appeals to dismiss the petitioner's appeal caused by court personnel rather than by the petitioner and is it a denial of due process to punish a blameless litigant for the mistakes or oversights of court personnel?

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"CORRECTED" STATEMENT OF THE CASE

Respondent's Brief in Opposition simply underlines Petitioner's on-going contention that as Trustee, Respondent has never had a grasp of the facts or true issues of this case, and continues to ignore both as relate to her duties to the estate, its creditors, and the debtor himself.

To say that "Carey Ebert just doesn't get it" is perhaps the most succinct summary possible.

Respondent's allegation of "revisionist history" is patently false because her "facts" are either wrong or misinterpreted.

1. Respondent disregards the fact that the underlying state court case was a dispute over the value of a piece of commercial real estate that had been mortgaged in 1985 for $283,547.97, for which the judgment creditor had agreed to pay $327,000 in 1991, and purportedly paid $320,800.00 in 2004. She ignores the 1994 state trial court by summary judgment that Petitioner's foreclosure cut off the tenant's rights to purchase the Property and refuses to admit to the Court that she abandoned the Property to the judgment creditor without ever demanding rent or offsets for the value represented. These are the simple, governing facts of fifteen years' litigation.

2. Although Petitioner's 1994 foreclosure cut off all of the tenant's rights to purchase the Property, the 2000 Judgment inexplicably gave the tenant a permanent injunction preventing Petitioner from taking possession of or interfer-

ing with the tenant's use of the Property in any way. No court – nor the Respondent – has ever addressed this obvious deprivation of Petitioner's property rights by the courts, or explained how Petitioner owned the Property but was prohibited by a court from using and enjoying it.

3. Respondent's summary of Petitioner's change of status in bankruptcy is misleading. The judgment creditor initiated the action to change Petitioner's bankruptcy status, claiming the estate could not satisfy its judgment by grossly overstating the judgment's value while grossly understating the Property's value. The misrepresentation of these two material facts misled the bankruptcy court and caused the resulting cascading errors.

4. Trustee's appointment is not disputed.

5. Petitioner vigorously disputes Respondent's assessment of the Property's value. Respondent's abandonment had been set up by the questionable change of status engineered by the judgment creditor to which she simply acquiesced.

6. The motion to abandon was approved based on judgment creditor's agents' testimony and the Trustee's blind acceptance of that testimony.

7. Respondent's claims that only then did Petitioner assert his claims for rent are false. Petitioner had been asserting those claims for years.

8. Respondent falsely claims that the back rents issue was "previously litigated". It was not.

9. Petitioner agrees his suit was denied.

10. Petitioner agrees he moved for a rehearing.

11. Petitioner agrees he appealed to the District Court on August 12, 2003.

12. Neither Petitioner nor his counsel received notice of any deficiency until just before the appeal was docketed and immediately corrected that deficiency.

13. Neither Petitioner nor his counsel received notice as to when his brief would be due either at the time that deficiency was corrected or thereafter.

14. It is untrue that Petitioner filed no brief, and equally untrue his counsel claimed that he was "too busy." Petitioner's filing listed three reasons for the counsel's delay: producing a writ to this Court, unfamiliarity with the bankruptcy filing deadlines, and not informed by his staff of the notice.

15. Rule 8001(a) states that "[a]n appellant's failure to take any step other than timely filing a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court . . . deems appropriate, which may include dismissal of the appeal." The language of the rule makes clear only the failure to file a notice of appeal deprives the reviewing court of jurisdiction and mandates dismissal. *In re Tampa*

Chain Co., Inc., 835 F.2d 54, 55 (2nd Cir. 1987) *(per curiam)*. June 23, 2004, Petitioner's timely response to the Order to Show Cause of June 9, 2004 included a copy of his finished Appellant's Brief, a separately filed Appeal Brief, and his Motion to Supplement. The actions of the filing clerk are recounted in detail in Petitioner's Writ. (p. 7).

16. Petitioner presented his evidence separate filing the Brief through the file stamps on the document to the judge. who rejected his proof without a hearing. A copy of the time-stamp illustration is attached as Exhibit A.

17. Respondent, unfamiliar as she is with the facts, misstates them: Only Petitioner's Motion to Supplement was unfiled, then inexplicably accepted and re-filed. An excerpt of the Motion showing those file-stamps is attached as Exhibit B. When the court notified Petitioner that the Brief needed to be filed "separately as its own document," Petitioner did so immediately. (Petitioner's Writ, pp. 7-8.)

18. Respondent's rush to mislead this Court shows the bankruptcy of her argument. The record shows the appeal "DISMISSED WITHOUT PREJUDICE to its refiling" (capitals in original). The Judgment of February 25, 2005 attached as Exhibit C.

19. Further, Respondent's unfamiliarity with the choreography of case at this point is understandable enough since she was represented throughout this period by the judgment

creditor's counsel, who signed all of the pleadings without ever entering a formal appearance on her behalf or notifying the Trustee of the Northern District of any potential conflict of interest in his doing so. That appearance of impropriety aside, the Fifth Circuit Panel's statement was error, relating not to Petitioner's Response or Brief, but to his Motion to Supplement. However, when this error was pointed out to the Fifth Circuit panel, they ignored it and denied Petitioner any relief. An image of the first page of the Motion to Supplement referred to in the Fifth Circuit Opinion of August 18, 2006 is attached as Exhibit D. Respondent's aspersions come from confusing the panel's error.

20. Petitioner's hearing was denied on October 2, 2006, not 2005 as Respondent claims.

21. Respondent's attempt to separate the case is specious. Petitioner's re-filing was completely proper and lawful, based on the District Court's original dismissal "without prejudice" and the Fifth Circuit's affirmation of it.

22. Petitioner's reasons for foregoing certiorari were based upon advice of counsel. The decision to restart the unprejudiced appeal was to avoid any potential limitations problems. Thus, Respondent's claim of prior adjudication is false.

23. Petitioner agrees that the bankruptcy court turned down the new suit on October 6, 2006.

24. Notice of Appeal was filed on October 20, 2006.

25. Petitioner objects to Respondent's "Second Appeal" characterization.

26. Respondent's characterization of the District Court's dismissal of the appeal is factually flawed and misleading. The January 2007 dismissal was based on the circumstances of the 2004 filing. The district court dismissed the appeal before the bankruptcy clerk transmitted the record on appeal or a time for filing the Brief was set. The fact that the Brief had been written and timely filed years before makes this assertion ludicrous.

27. The Fifth Circuit affirmed the erroneous ruling.

28. Respondent's sarcastic allusion to "some unknown clerk" is especially troubling. Petitioner's counsel investigated the Brief's filing and unfiling and found that the District Clerk admitted during a telephone conversation that "the unfiling of the Brief as a separate document resulted from 'a mistake' by the intake clerk and, since the time of that 'mistake', the procedures within the office had been changed to prevent a recurrence of such an event." Petitioner's Counsel's Affidavit executed on April 7, 2007 is attached as Exhibit E. The District Clerk, however, failed and refused to admit the mistake in writing self-servingly claiming ". . . I have no personal knowledge concerning this matter . . . ." A copy of her letter is attached as Exhibit F. As a result, Petitioner's counsel wrote to the Chief Administrative Judge of the Northern District of Texas on September 26, 2006 to make him aware of the matter. A copy of his letter is attached as Exhibit G. Still, no action was taken by anyone in authority

in the Northern District to correct the violations of Petitioner's rights in the cascade of uncorrected errors.

REPLY TO RESPONDENT'S ARGUMENTS

Restatement of Petitioner's Argument

Respondent correctly stated Petitioner's argument.

Respondent's Claim of No Violation

Petitioner's appeal was thwarted on procedural grounds throughout its tortured journey through the Fifth Circuit courts. The errors Respondent refuses to recognize or even acknowledge exalt form over substance – which has never been sanctioned by our courts. It is ludicrous to expect litigants to personally monitor the internal workings of a clerk's office to insure its personnel's conscientious attention to their duties. Using all of the caution the circumstances permitted, Petitioner filed his Brief in the district court no less than three (3) times.

Respondent's Claim Petitioner is Wrong Demonstrates Respondent's Ignorance of the Facts

Petitioner has made various showings of proof to virtually every court and individual involved in the adjudication of this case only to have them ignore, misunderstand or simply deny (as Respondent does) the proof presented. Petitioner respond-

ed energetically to the district court's June Order to Show Cause by filing a specific answer to the Order, which an analysis of the record shows was accepted by the district court as adequate since that court did not act immediately to dismiss the appeal and, when it did dismiss, did so without prejudice.

Respondent's Meritless Claim That Petitioner's Rights Were Not Violated

Respondent's claim that any argument was made and lost is pure fiction. Each and every ruling in the chain in the entire length of this litigation has been based on one erroneous procedural ruling or assumption after another flowing from the Clerk's mistake.

Respondent's Due Process Analysis Substantiates Petitioner's Claim

Courts have clearly deprived Petitioner of a valuable piece of commercial real estate, its improvements, and the fruits of its rents for almost fifteen (15) years through procedures that under virtually any legal analysis can only be characterized as "conflicting", "confused", "unlawful" and "erroneous."

The cascading series of errors based on the bogus value propounded from the state court through the bankruptcy court and the subsequent appeal courts has now been exposed by a Constable's Sale price of more than three times the value claimed, and turns the bankruptcy's propositions upside down.

Respondent's Claims of Petitioner's Failures Are False

Any thoroughgoing analysis of Petitioner's many pleadings to the courts below shows that Petitioner made valid claims that were simply misunderstood or brushed. This Court in *Bowles*, in considering the effect of a violation of procedural rules which were adopted by a court rather than by statute, stated: "On the other hand, we have treated the rule-based time limit for criminal cases differently, stating that it may be waived because '[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion. . ." *Bowles v. Russell*, 127 S.Ct. 2360, 2364-65 (2007). See also *Kontrick v. Ryan*, 540 U.S. 443, 453 (2004) (Bankruptcy Rules adopted by the court for the orderly transaction of its business are not jurisdictional).

Petitioner's brief was in fact timely filed as a separate pleading on June 23, 2004 only to be "unfiled" by the mistaken actions of a clerk over whom he had no control and could exercise no authority. Even when his counsel contacted the District Clerk and the Chief Administrative Judge, no action to correct the error – or even acknowledge it – was ever taken. Instead, the various actors have tried to torpedo the case with bogus claims of procedural errors or by simply ignoring the facts once they have been pointed out. The results are nothing less than injustice.

CONCLUSION

Reading Respondent's explanation, one would believe that Petitioner did nothing to seek the justice he deserves. Nothing could be – or is – further from the truth. Any thoroughgoing reading of the mountainous stack of pleadings prepared for the bankruptcy court, the two district courts and the two Fifth Circuit panels make it crystal clear that each time Petitioner met with a negative outcome he availed himself of the next step in the appellate process. Every court file shows notices of appeal, motions for rehearing, motions for new trials, and motions for rehearing en banc. In every case, motions after judgments and orders point out to the courts the errors complained of, and most present documentary evidence or visual proofs.

Petitioner asks plaintively:

"What more could I have done?"

Respectfully submitted,

Frank P. Hernandez

BEST AVAILABLE COPY

EXHIBIT A
File Stamps of Separately Filed Brief

"FILESTAMP/RECEIVED STAMP" EXHIBIT

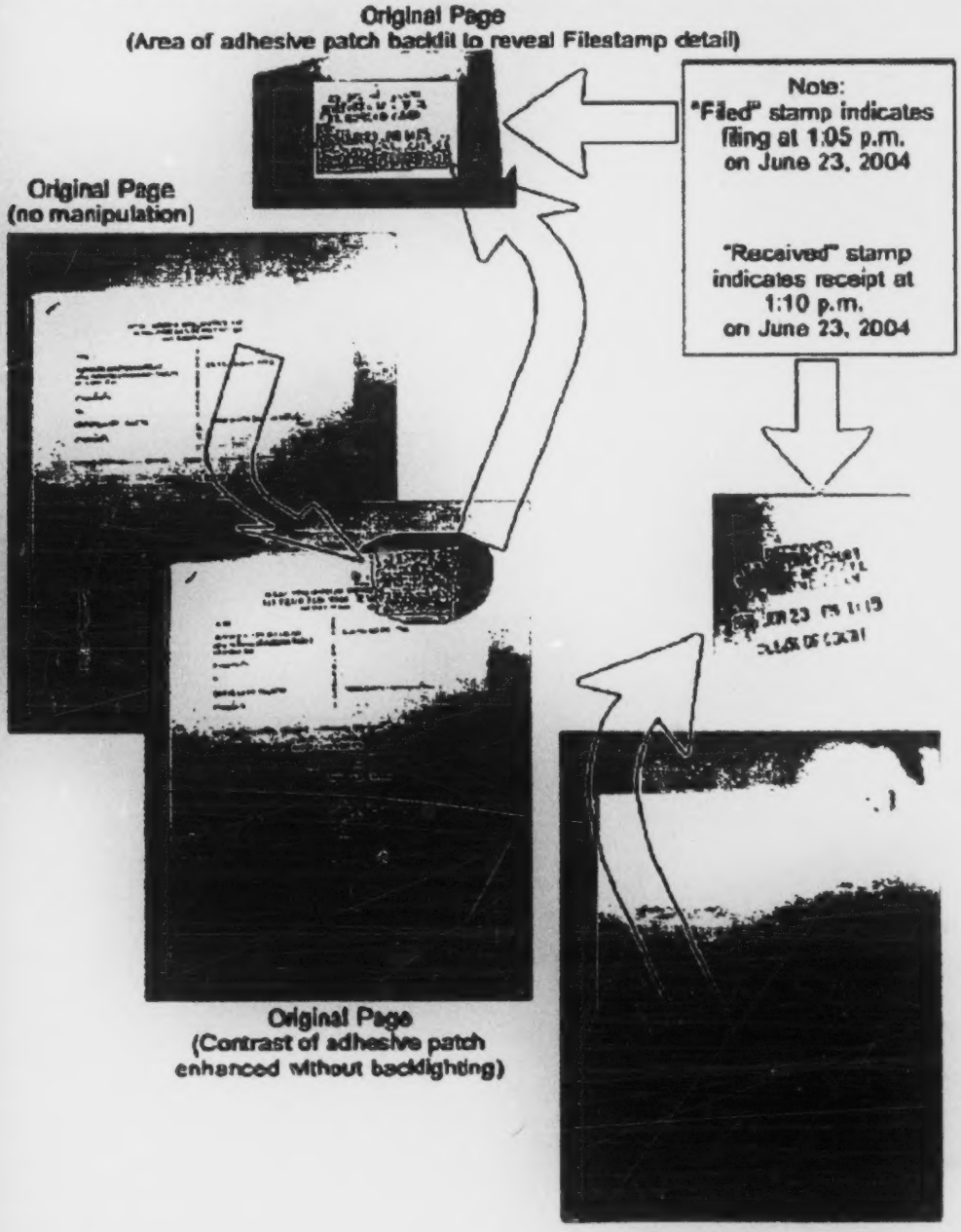

EXHIBIT B
Excerpt: Motion to Supplement Record

FILED
U.S. DISTRICT COURT
NORTHERN DIST. OF TX
FT. WORTH DIVISION
2004 AUG -3 PM 1:05

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
Fort Worth Division

KENNETH ALLEN GOLDBLATT § Case No 4:04-CV-337-Y
§
vs. §
§ Appeal from the Bankruptcy Court
CAREY EBERT, TRUSTEE §

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUL 2 2004
CLERK, U.S. DISTRICT COURT

MOTION TO SUPPLEMENT RECORD

TO THE HONORABLE TERRY R. MEANS,
UNITED STATES DISTRICT JUDGE:

KENNETH ALLEN GOLDBLATT, Appellant Debtor herein, files this his Motion to Supplement Record In support of this Motion, Goldblatt respectfully shows the Court the following:

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
AUG - 3 2004
CLERK, U.S. DISTRICT COURT

Kenneth Allen Goldblatt (hereinafter, "Appellant"), requests this permission to supplement the record with the following documents:

1. Constable's Deed of April 14, 2004, designated as "Record Supplement 2" [RS2] and so designated in Appellant's Brief
2. Petition for Writ of Prohibition, In re A&W Industries, Inc., John C Applewhite, Bart George, and Sherry Rountree, Relators, In the Court of Appeals, Second District of Texas, Fort Worth, Texas, filed September 19, 2000, designated as "Record Supplement 3" [RS3] and so designated in Appellant's Brief.

EXHIBIT C
Final Judgment of District Court

ORIGINAL

FILED
FEB 25
CLERK, U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

KENNETH ALLEN GOLDBLATT	§	
	§	
VS	§	ACTION NO 4:04-CV-337-Y
	§	
CAREY EBERT, Trustee, ET AL.	§	04-43193-dm7

FINAL JUDGMENT

In accordance with the order issued this same day and Federal Rule of Civil Procedure 58,

It is hereby ORDERED, ADJUDGED, and DECREED that the above-referenced bankruptcy appeal is hereby DISMISSED WITHOUT PREJUDICE to its refiling. All costs of Court under 28 U.S.C. § 1920 shall be borne by Appellant.

SIGNED February 25, 2005

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

EXHIBIT D
Fifth Circuit Opinion of August 18, 2006

United States Court of Appeals
Fifth Circuit
FILED
August 18, 2006
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 05-10747
Summary Calendar

In The Matter of: KENNETH ALLEN GOLDBLATT,

Debtor,

KENNETH ALLEN GOLDBLATT,

Appellant,

versus

CAREY EBERT, Trustee,

Appellee.

Appeal from United States District Court
for the Northern District of Texas
No. 4:04-CV-337

Before BARKSDALE, STEWART, and CLEMENT, Circuit Judges.

PER CURIAM:*

Kenneth A. Goldblatt challenges the determination of the district court that he failed to file his brief on appeal, and the resultant orders that dismissed his bankruptcy appeal, with prejudice, and denied his motion for new trial. We affirm.

*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

EXHIBIT E
Affidavit of Petitioner's Counsel

AFFIDAVIT

STATE OF TEXAS

DALLAS COUNTY

Before me, the undersigned person, on this day personally appeared **FRANK P. HERNANDEZ**, who is personally known to me, and first being duly sworn according to the law upon her oath deposed and said:

"My name is Frank P. Hernandez. I am over the age of 18 years. I have never been convicted of a crime, and I am fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and they are all true and correct.

1. I am a licensed attorney in the State of Texas, admitted to practice in the Northern District of Texas and other jurisdictions.

2. I have represented Appellant Kenneth Allen Goldblatt since 1994 in the suite of litigation in state and federal fora that includes the previous and instant appeals before this Court.

3. Before filing the present (second) appeal on the matter now before this Court, I contacted the Federal District Clerk's Office, Fort Worth Division, to investigate the circumstances of the filing and unfiling of Appellant's Appeal Brief and the dismissal of the appeal "without prejudice" in the prior appeal of the subject matter before this Court.

4. In this effort, I contacted an assistant District Clerk, who told me that the unfiling of Appellant's Appeal Brief as a separate document resulted from "a mistake" on the part of the intake clerk and, since the time of that "mistake" the procedures within the office have been changed to prevent a recurrence of such an event.

5. In pursuing this matter, I also wrote to the Administrative Judge for the Northern District of Texas who refused to correct the clerk's error.

6. It is my professional opinion, based in part on over forty years of legal practice, that the dismissal of Appellant's first appeal resulted from a mistake by the presiding judge, based on a mistake by the intake clerk and the Clerk's Office, and that the dismissal of the instant appeal resulted from a misunderstanding by the presiding judge in the instant (second) appeal of the same matter.

7. It is my further professional opinion that if the original district judge had meant to end the appeal permanently, he would not have allowed Appellant to supplement the record with the document now before this Court, and would not have dismissed the appeal "without prejudice" to its refilling as the record shows that he did.

FURTHER AFFIANT SAITH NOT

Frank P. Hernandez

State of Texas

County of Dallas

Before me, a notary public in and for Dallas County, Texas, on this day personally appeared Frank P. Hernandez, to me well known to be a credible person of lawful age and qualified in all respects to make this affidavit, who being first sworn on oath, says that he has the capacity to make this affidavit and that every statement is true and correct.

Subscribed and sworn before me on April 3, 2007, to certify which witness my hand and seal of office.

Notary Public
State of Texas

My Commission Expires

2/28/2010

JOANNE CONSTANTINIDES
Notary Public, State of Texas
My Commission Expires
02/26/2010

EXHIBIT F
District Clerk's Letter to Petitioner's Counsel

United States District Court
Northern District of Texas

Karen Mitchell
Clerk of Court

1100 Commerce, Room 1452
Dallas, Texas 75242

September 12,2006

Mr Frank P Hernandez
716 Wayne Street
Dallas, TX 75223

SUBJECT Civil Action No 4:04-CV-337-Y, Goldblatt v Ebert

Dear Mr Hernandez.

I am writing in response to your attached letter dated September 12,2006 In your letter, you ask me to write a letter acknowledging that you filed a brief in the Fort Worth division on June 23, 2004, as a separate document and that it was mistakenly unfiled and stamped "received " I have no personal knowledge concerning this matter and am therefore unable to comply with your request

Sincerely,

Karen Mitchell

Attachment

cc: Pam Murphy

EXHIBIT G
Counsel's Letter to Chief Administrative Judge

FRANK P. HERNANDEZ
LAWYER
716 WAYNE STREET
DALLAS, TEXAS 75223

Telephone
(214) 821-1213
Fax
(214) 821-1015
E-mail
fpenglo@aol.com

September 26, 2006

Judge Joe Fish
Chief Administrative Judge
U. S. District Judge
1100 Commerce
Dallas, TX 75201

Re.: Civil Action No. 4:04-CV-337-Y, Goldblatt v. Ebert

Dear Judge Fish:

I enclose for you a copy of my letter to U. S. District Clerk Ms. Karen Mitchell of September 12,2006. I enclose for you her incredible response of June 12,2006. I enclose for you my client's Petition For Rehearing En Banc that was properly filed with the Fifth Circuit Court of Appeals on September 19, 2006. All of these documents clearly describe the situation as relates to this case.

I consider this matter an administrative matter that has had grave impact on my client's right to a meaningful appeal before Judge Means. I consider his actions to be administrative. And, it need not be said, but the actions of the agents, servants and employees of the U. S. District Court are clearly administrative.

I write you so that you, as the boss of the U. S. District Clerk can know of this situation and can take action to rectify this injustice.

I know that you do not care for me, and it really generally doesn't impact me, nor does the fact that Judge Means has the same feelings. However, actions against me are individual to me, but actions against me that gravely impact my client are not acceptable and are not taken lightly.

Please review this matter in an objectionable manner and you will see that this case needs to be decided on the merits by Judge Means. It is not acceptable to my client or me that it is in the judicial system. It is clearly an

administrative matter where the U. S. District Clerk was completely wrong and the error needs to be corrected. If it is not I fear that much judicial effort will ensue in the form of unnecessary litigation against all who had an opportunity to rectify the wrong done to my client.

If you want to discuss this matter you may call me at 214-826-0488.

Thank you for your attention to this matter.

Sincerely yours,

Frank P. Hernandez

Encls.